No. 76-1455

In the Supreme Court of the United States

OCTOBER TERM, 1976

WELLMAN INDUSTRIES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. On June 14, 1972, the Board's Regional Director certified the Union[1] as the exclusive bargaining representative of petitioner's employees (Pet. App. 5a). Petitioner thereafter rejected several requests by the Union to bargain on the ground that the certification was invalid (*ibid.*). Upon unfair labor practice charges filed by the Union, the Board, on June 17, 1974, ruled that petitioner had violated Section 8(a)(5) and (1) of the National Labor Relations Act, 61 Stat. 140, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain with the Union and by making changes in working conditions, laying off unit employees, and promulgating new work rules

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[1]Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC (formerly Textile Workers Union of America, AFL-CIO, CLC).

without consulting or notifying the Union. The Board ordered petitioner to cease its illegal course of action and to bargain with the Union. *Wellman Industries, Inc.*, 211 NLRB 639. The court of appeals enforced the Board's order (519 F. 2d 1401 (C.A. 4)) and this Court denied certiorari (423 U.S. 927).

During the period in which it was contesting the Union's certification, petitioner not only continued to refuse to recognize and bargain with the Union, but also took unilateral action affecting the wages, hours, and other terms and conditions of employment of its employees. Without consulting or notifying the Union, petitioner laid off and transferred unit employees, reduced employee pay or job classifications, and changed its on-call rule and shift rotation system (Pet. App. 6a-10a). The Union filed additional unfair labor practice charges with the Board (Pet. App. 2a). On January 13, 1976, the Board ruled that petitioner had further violated Section 8(a)(5) and (1) of the Act and ordered petitioner to remedy its unfair labor practices and to bargain with the Union (222 NLRB 204; Pet. App. 10a-11a, 29a-30a). The court of appeals enforced the Board's order (Pet. App. 31a-32a).

2. The court of appeals correctly rejected petitioner's claim that an employer may lawfully make unilateral changes in employment conditions while it contests a union's certification through unfair labor practice proceedings before the Board and during judicial review of those proceedings. Further review by this Court is unwarranted.

It is well settled that "once any employer becomes aware of a properly designated bargaining representative, he may not unilaterally make changes in the employees' terms and conditions of employment, without first giving the representative an opportunity to bargain collectively." *Fleming*

Manufacturing Co., Inc., 119 NLRB 452, 464. Accord: *National Labor Relations Board* v. *McCann Steel Co.*, 448 F. 2d 277, 279 (C.A. 5); *King Radio Corp.* v. *National Labor Relations Board*, 398 F. 2d 14, 17 (C.A. 10); *National Labor Relations Board* v. *Laney & Duke Storage Warehouse Co.*, 369 F. 2d 859, 866, 869 (C.A. 5); *National Labor Relations Board* v. *Zelrich Co.*, 344 F. 2d 1011, 1015 (C.A. 5); *Mike O'Connor Chevrolet*, 209 NLRB 701, 703, reversed on other grounds, 512 F. 2d 684 (C.A. 8); *General Electric Co., Battery Products Capacitor Department* v. *National Labor Relations Board*, 400 F. 2d 713, 718 (C.A. 5), certiorari denied, 394 U.S. 904; *Sixteenth Annual Report of the National Labor Relations Board* 199 (1951). Cf. *National Labor Relations Board* v. *Katz*, 369 U.S. 736, 747. As the foregoing decisions indicate, as soon as a union's majority status is established by the tally of ballots at a Board election, the employer is on notice that the union is presumptively the duly elected representative of its employees. From that moment on, the employer acts "at its peril" (*King Radio Corp., supra*, 398 F. 2d at 17) if it attempts to disturb the *status quo* pending issuance of a certification (or, should the certification be contested, pending its review). Unilateral action in the interim can only have "the effect of bypassing, undercutting, and undermining the union's status as the statutory representative of the employees in the event a certification is issued"; a rule contrary to that adopted in the above decisions "would allow an employer to box the union in on future bargaining positions by implementing changes of policy and practice during the period when objections or determinative challenges to the election are pending." *Mike O'Connor Chevrolet, supra*, 209 NLRB at 703.

Nor is it material that petitioner, while contesting the Board's certification in unfair labor practice and court proceedings, may have entertained a good faith doubt

regarding the validity of the certification. Petitioner's faulty prediction of the outcome of the challenge to certification is not a defense to a refusal to bargain charge. See *Old King Cole, Inc.* v. *National Labor Relations Board*, 260 F. 2d 530, 532 (C.A. 6); *Kingsbury Electric Cooperative, Inc.* v. *National Labor Relations Board*, 319 F. 2d 387, 391 (C.A. 8); *National Labor Relations Board* v. *Winn Dixie Stores, Inc.*, 361 F. 2d 512, 516 (C.A. 5), certiorari denied, 385 U.S. 935; *National Labor Relations Board* v. *Intalco Aluminum Corp.*, 446 F. 2d 1232, 1234, n. 3 (C.A. 9). Moreover, "the duty [to bargain collectively] * * * may be violated without a general failure of subjective good faith * * *." *National Labor Relations Board* v. *Katz, supra*, 369 U.S. at 743.[2]

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

JOHN S. IRVING,
General Counsel,
National Labor Relations Board.

JUNE 1977.

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[2]Petitioner's reliance on *Katz* (Pet. 11) is misplaced. Although the Court in that case said (369 U.S. at 748) "we do not foreclose the possiblity that there might be circumstances which the Board could or should accept as excusing or justifying unilateral action," no such case is presented here. Even accepting petitioner's statement (Pet. 11) that its unilateral action was taken in response to "pressing economic and operational pressures," it does not follow that petitioner could not have ameliorated those pressures by the same or similar actions taken after fulfillment of its duty to bargain with the union.